IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

02-73420

VIOLETA CIRCU,

Petitioner,

v.

JOHN ASHCROFT,
ATTORNEY GENERAL FOR THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REVIEW FROM BOARD OF IMMIGRATION APPEALS
(A 73 415 760)

PETITION FOR REHEARING EN BANC PURSUANT TO FRAP 35(b)

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INTRODUCTORY STATEMENT BY COUNSEL

Pursuant to Federal Rule of Appellate Procedure 35, petitioner Violeta Circu hereby seeks rehearing *en banc* of the panel decision in *Circu v. Ashcroft*, 389 F.3d 938 (9th Cir. 2004), in which it held that the denial of Ms. Circu's constitutionally protected right to a full and fair asylum hearing constituted a harmless error. *Circu*, 389 F.3d at 940-941. The panel's decision directly conflicts with this Court's settled precedent embodied in *Castillo-Villagra v. INS*, 972 F.2d 1117 (9th Cir. 1992) and its progeny, and consequently consideration by the full court is necessary to secure and maintain uniformity of the Court's decisions . *See Castillo-Villagra v. INS*, 972 F.2d 1117 (9th Cir. 1992); *Sarria-Sibaja v. INS*, 990 F.2d 442 (9th Cir. 1993); Gomez-*Vigil v. INS*, 990 F.2d 1111 (9th Cir. 1993); *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994); *Getachew v. INS*, 25 F.3d 841 (9th Cir. 1994); *Gonzalez v. INS*, 82 F.3d 903 (9th Cir. 1996).

Ms. Circu was denied asylum based on the agency's reliance on the United States Department of State's Country Report on Human Rights Practices relating to Romania that was published February 2000 ("1999 Report") nearly two years after the case had been submitted on July 29, 1998. Certified Administrative Record ("CAR") 64-66. Because the 1999 Report was never introduced into evidence and was published nineteen (19) months

after the case had been submitted, Ms Circu did not have an opportunity to present evidence to rebut it. Id.

Castillo and every case that has addressed the issue has held that in such circumstances -- when an asylum applicant is not afforded an opportunity to rebut evidence on which the agency relies to deny asylum -- constitutional due process mandates a remand to the agency to provide the applicant an opportunity to do so. *Castillo*, 972 F.2d at 1030-1031; *Gomez-Vigil*, 990 F.2d at 1113-1114; *Kahssai*, 16 F.3d at 324-325; *Getachew*, 25 F.3d at 847-848; *Gonzalez v. INS*, 82 F.3d at 911-912. Therefore, rehearing is necessary to maintain uniformity of this Court's decisions. FRAP 35(a)(1).

The basis of the panel's conclusion that the agency's error was harmless is also a ground for rehearing because it directly conflicts with settled precedent. The first rationale provided by the panel discards the United States Supreme Court's decision in *INS v. Ventura*, 537 U.S. 12 (2002), that instructs against circuit courts exercising de novo review of asylum proceedings and reaching a factual finding that the agency did not address. *See INS v. Ventura*, 537 U.S. at 14 ("The Court of Appeals exceed[s] its legal authority when it decided the 'changed circumstances' matter on its own.") The panel, after acknowledging that the agency erred by relying on the 1999 Report found that the error was harmless because the

immigration judge "*should have*" relied on the Department of States Country Report published two years earlier in 1998 ("1997 Report") that was part of the record to reach the same conclusion. *Circu*, id. at 940. Conducting *de novo* review, "[The panel] observe[d] no significant differences between the respective reports' language concerning religious persecution in Romania." *Id.* at 940. However, as the panel itself recognizes, the agency did not address whether the Department of State's 1997 country report was sufficient to support a finding of changed country conditions to deny Ms. Circu relief. CAR 63-66. The panel thus decided the "changed circumstances matter on its own" in contravention of *Ventura*. *Ventura*, id. at 16-17 (Summary reversing grant of asylum because appellate court addressed issue of changed country conditions before agency ruled on the issue.) In the process the panel ignored another cornerstone of judicial review of agency decisions by affirming the agency decision on a ground other than that set forth by the agency. *See Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Hasan v. Ashcroft*, 380 F.3d 1114, 1122 (9th Cir. 2004), *quoting Navas v. INS*, 217 F.3d 646, n.16 (9th Cir. 2000); *see also Martinez-Zelaya v. INS*, 841 F.2d 294, 296 (9th Cir. 1988).

The panel's second rationale for finding the agency's error harmless, like its first, also directly contravenes controlling precedent. The panel rather cryptically found that, because the Office of the Immigration ("IJ") announced in its decision that it had taken judicial notice of the out of record 1999 Report two years after the case had been submitted, Ms. Circu had "notice that the IJ relied on the 1999 report because she raised the issue on appeal to the" Board of Immigration Appeals ("BIA"). *Circu*, id. at 940. The panel concluded without elaboration, "therefore she also had an opportunity to challenge the reports contents." *Id.* The panel does not identify what comprised Ms. Circu's opportunity other than her raising the issue before the BIA and requesting remand to the IJ to submit rebuttal evidence as she did. *Id.* What the panel appears to be implying, as Circuit Judge Hawkins articulates in his dissent, is that Ms. Circu was expected to do more than exhaust her administrative remedies. *Circu*, id. at 942(Judge Hawkins dissenting). The panel seems to believe that Ms. Circu was also required to introduce rebuttal evidence before the BIA to establish that she was prejudiced by the IJ's misguided reliance on the 1999 report. *Id.* Ms. Circu, however, cannot present evidence to the BIA through her appeal because the BIA is an appellate tribunal. See "Board of Immigration Appeals Practice Manual," § 4.8 ("Evidence on Appeal"). The only means for Ms. Circu to

present evidence to the BIA is by filing separate motions to either remand or reopen the proceedings. *See Matter of Coelho*, 20 I. & N. 464, 471-473 (BIA 1992) (Explaining that motions to reopen and remand are the two vehicles for aliens to present new evidence before the BIA, and that motions to remand, like motions to reopen, must be filed separately from the appeal and meet the requirements of a motion to reopen.); see also "Board of Immigration Appeals Practice Manual," § 4.8 ("Evidence on Appeal"). This Court has expressly held that such motions collateral to the appeal are not required to establish that the alien was prejudiced by the agency's taking judicial notice of facts to support a finding of changed country conditions without affording the alien an opportunity to respond. *See Castillo-Villagra v. INS*, 972 F.2d at 1030; *Gomez-Vigil*, 990 F.2d at 1132-1136(Circuit Judge B. Fletcher concurring.) Significantly the Court's approach is consistent with the Attorney Generals recent emphasis that the appellate functions of the BIA remain distinct from the trial functions of the IJ in order to promote timely adjudications of appeals. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2002). Thus, under the governing precedent and applicable procedures with respect to litigation before the agency, Ms. Circu "did what she should have done: ask the BIA to remand to the IJ to permit her to

introduce new evidence to counter the 1999 report." *Circu*, id at 942 (Judge Hawkins dissenting).

Accordingly, in addition to maintaining uniformity of the court's decisions, *en banc* consideration is necessary to address questions of exceptional importance, such as the roles of the judiciary, BIA and IJ in the asylum adjudicative process, and what is expected from litigants to establish that they have been prejudiced as a result of not being afforded a full and fair hearing. *See Reyes-Mendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (Aliens in removal proceedings are entitled to due process).

ISSUES PRESENTED FOR REHEARING

The panel exercised direct review of the "IJ's decision since the BIA affirmed without opinion." *Circu*, 389 F.3d at 940. The issues presented for rehearing as a result of the panel decision are:

1. Whether the panel erred by finding that that the IJ's taking judicial notice of an out of record country report to deny Ms. Circu relief was harmless based on a factual findings not reached by the IJ and thus deciding the "changed circumstances matter on its own?" and

2. Whether the panel erred by finding that that the IJ's taking judicial notice of an out of record country report to deny Ms. Circu relief was harmless because, according to the panel, Ms. Circu "had the opportunity to challenge the report's contents" by a vehicle other than requesting that the BIA remand the proceedings to the IJ?

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ARGUMENT

A. THE PANEL'S FINDING THAT MS. CIRCU WAS NOT PREJUDICED AS A RESULT OF THE IJ'S ERROR OF DENYING HER ASYLUM BASED ON THE 1999 COUNTRY REPORT THAT WAS NOT A PART OF THE ADMINISTRATIVE RECORD & WAS PUBLISHED AFTER THE CASE HAD BEEN SUBMITTED WAS CONTRARY TO CONTROLLING PRECEDENT.

1. THE PANEL WAS CORRECT THAT THE IJ ERRED BY RELYING ON THE 1999 COUNTRY REPORT TO DENY MS. CIRCU ASYLUM WITHOUT AFFORDING HER AN OPPORTUNITY TO RESPOND TO IT.

Ms. Circu, a citizen and national of Romania, has suffered persecution on account of her religion. CAR at 64-65, *Circu*, 389 F.3d at 939-940. Therefore, as the IJ correctly determined, Ms. Circu meets the definition of a refugee pursuant to INA § 101(a)(43). *Id.*; *see also Lim v. INS*, 224 F.3d 929 (9th Cir. 2000)(Alien may meet definition for refugee if she has suffered past persecution or by proving he has a well-founded fear of future persecution.). As a refugee who has suffered past persecution, Ms. Circu, under the governing regulations, is presumed to have a well-founded fear of countrywide persecution and to be statutorily eligible for asylum under INA § 208. See 8 C.F.R. § 208.13(b)(1)(i); 8 C.F.R. § 208.13(b)(3). As a result, "the burden shifts to the government to rebut the presumption that [Ms.

Circu] is eligible for asylum." *Mashiri v. Ashcroft*, 283 F.3d 1112, 1122 (9th Cir. 2004).

The IJ afforded Ms. Circu the presumption of a well-founded fear of persecution but denied her asylum, because according to the IJ, her presumption of her well-founded fear was rebutted. CAR at 65. The IJ did not find that the evidence in the record rebutted Ms. Circu's fear of persecution. CAR at 64-66. However, according to the IJ, the 1999 Report published in February 2000, nineteen (19) months after the case was submitted in July of 1998, served to rebut the presumption. CAR at 65-66. Prior to issuing her decision on August 30, 2000, which was more than two years after the case had been submitted, Ms. Circu in fact did not have any notice that the IJ intended to rely on 1999 Report to deny her relief. Id.

Consistent with the unequivocal controlling precedent, the panel did not dispute that it was incorrect for the IJ to rely on the 1999 Report. *Circu*, id. at 939-940. Indeed, on every occasion this Court has faced the issue, it has held that it is error for an agency to rely on a Department of State publication after the close of evidence to support a denial of asylum without affording the alien an opportunity to submit rebuttal evidence. *See Castillo-Villagra v. INS*, 972 F.2d at 1028-1030; *Sarria-Sibaja v. INS*, 990 F.2d at

443-444; *Gomez-Vigil v. INS*, 990 F.2d at 1112-1114; *Kahssai v. INS*, 16 F.3d at 324-325; *Getachew v. INS*, 25 F.3d 845-848; *Gonzalez v. INS*, 82 F.3d at 910-912.

The panel, however, departed from precedent by not directing remand. *Circu*, id. at 940-941. The panel concluded that because the error was harmless, reliance on the 1999 Report did not violate Ms. Circu's right to constitutional due process. *Circu*, id; *see Barraza-Rivera v. INS*, 913 F.2d 1443, 1447 (9th Cir. 1990)(In order to establish due process violation alien must establish that he was prejudiced by agency's transgression.) In reaching this conclusion, the panel failed to comprehend the critical underpinnings of this Court's prior decisions that have concluded when the agency "relies, in whole or in part, on extra-record facts for its determination of whether an asylum applicant has demonstrated a well-founded fear of persecution, we must grant the applicant's petition for review." *Getachew*, 25 F.3d at 848, *citing*, *Kahssai*, 16 F.3d at 325. The panel's disregard for precedent and failure to apprehend the rationale for this Court's uniform approach resulted in a decision that audaciously exceeded the limitation of this Court's statutory authority and invaded the expertise of the agency; confused the roles of the IJ and BIA; and invited disarray with respect to practice before the agencies. *Lopez v. Ashcroft*, 336 F.3d 799, 807 (9th Cir.

of incorrectly decided changed country conditions determination is appropriate in deference to agency's expertise on immigration matters.)

2. THE PANEL'S FINDING THAT THE IJ'S ERROR WAS HARMLESS IS BASED ON AN UNWARRANTED REINVENTING OF THE ROLES OF THE AGENCIES & THIS COURT IN THE ADJUDICATION OF ASYLUM APPLICATIONS.

a. In affirming the IJ's decision on grounds that are not only different from the IJ's findings, the panel adopted a role that was expressly deemed improper by the Supreme Court in *Ventura*.

In holding that the IJ's error was harmless on the grounds that the IJ *should have* relied on the 1997 Report instead of the 1999 Report to deny Ms. Circu relief, the panel jettisoned the core principles that govern judicial review of agency asylum decisions set forth in *INS v. Ventura*, 537 U.S. 212 (2002).

Ventura involved a Guatemalan asylum applicant who the BIA wrongly concluded had not suffered persecution on a protected ground. *Id.* at 14-15. After reversing the BIA's decision on that ground, and finding that the applicant was a refugee, the Ninth Circuit proceeded to consider whether the country conditions had rebutted the presumption of his fear of persecution. *Id.* The BIA did not reach the issue. *Id.* The Ninth Circuit, nevertheless, held that the evidence in the record did not support a

conclusion that the applicant's fear of persecution had been rebutted, and entered an order finding the applicant statutorily eligible for asylum. *Id.* The government appealed the decision to the Supreme Court. The Supreme Court accepted certiorari on the question of whether, "the Court of Appeals exceeds its authority when it decided the 'changed circumstances' matter on its own." *Id.* at 14. The Supreme Court summarily reversed the Ninth Circuit, holding that the proceedings should have remanded the case to the BIA.

The Supreme Court based its decisions on fundamental canons of judicial review of administrative decisions. The Supreme Court admonished that "the law entrusts" the agency to make the decisions with respect to asylum eligibility." *Id.*. at 16. The Supreme Court further admonished that "a court of appeals 'is not generally empowered to conduct *de novo* inquiry into the matter being reviewed and to reach its own conclusion based on such an inquiry.'" *Id.*, *quoting Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985).

The Supreme Court identified two policy considerations in the asylum context that supported such a result. *Ventura*, id. at 17-18. The first was when appellate courts reach decisions on grounds other than the agency has advanced or has yet to decide, it intrudes on the province of the IJ's and

BIA's expertise. *Id.* Secondly, when adjudicating the issue of changed country conditions, remand is the preferred result because it allows for the submission of further evidence before the agency that may have become available since the initial decision. *Id.* at 18.

The panel's error in this case exceeds the error that was summarily reversed by *Ventura*. Here, the panel did not simply reach an issue that the agency did not address. Instead, the panel affirmed the agency decision based on the grounds that the IJ *should have* reached its decision by relying on the 1997 Report, even though there is zero indication that the IJ believed that the 1997 Report rebutted Ms. Circu's fear of persecution. In so doing, the panel incorrectly substituted the IJ reasons for denying Ms. Circu relief with its own. "In dealing with a determination or judgment which an administrative agency is alone authorized to make, [appellate courts] must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative agency decision by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). As this Court has recognized, the Supreme Court does not allow appellate courts to exercise de novo review of the factual issues underlying asylum claims by affirming the agency's decisions on grounds other than the

agency set forth. *See Hasan*, 380 F.3d at 1122; *Navas*, 217 F.3d at 646, n.16; *Martinez-Zelaya*, 841 F.2d at 296 (9th Cir. 1988).

The policy issues that animated *Ventura* are also present here. Like in *Ventura*, the IJ here had a substantial basis for finding the 1997 Report supported Ms. Circu's persecution claim. See infra., at 17. Additionally, more than four years have passed since the IJ's decision, and the adjudication of Ms. Circu's application for relief will benefit from a remand that will allow the parties to submit evidence "that may well prove enlightening." *Ventura*, id at 18.

Ventura's reasons for limits on judicial review is consistent with that of this Court in instances where it has deemed remand the appropriate remedy when the agency relies on a document outside the record to deny asylum without providing the applicant notice and an opportunity to respond. This Court in *Castillo-Villagara* , after finding that the agency erred by taking administrative notice of facts outside the record, "suggested no determination," explaining that "[n]either we nor, without an opportunity for a hearing, the BIA, can properly say whether applicants have a well-founded fear" based on the noticed facts. *Castillo-Villagara*, id. at 1031. The panel's errant departure from *Castillo-Villagara* and the decisions that wisely

endorsed it was incorrect. *See Sarria-Sibaja*, id.; *Gomez-Vigil*, id.; *Kahssai*, id.; *Getachew v. INS*, id.; *Gonzalez*, id.

b. The panel's suggestion that Ms. Circu had an alternative to remedying the IJ's error other than challenging it before the BIA during the course of her appeal and requesting remand is based on a fundamental mischaracterization of the roles of the adjudicating agencies.

An alternative reason that the panel provides for upholding the IJ's decision to deny Ms. Circu relief is that: "Circu must have had notice that the IJ relied on the 1999 Report because she raised the issue on appeal; therefore she also had an opportunity to challenge the reports content." *Circu*, 389 F.3d at 940. The point of the panel's decision is confusing to say the least as it is undisputed that Ms. Circu exhausted her administrative remedies by filing an appeal of the IJ's decision with the BIA and challenging the constitutionality of her reliance on it, and requesting remand to rebut it. *See Ageyman v. INS*, 296 F.3d 871, 877-878 (9th Cir. 2002)(Alien who raises due process claim before BIA has exhausted his administrative remedies).

The panel decision does not explicate what avenues were available to Ms. Circu other than requesting remand to the IJ despite the dissent's objections to its proclamation to the contrary. *Circu*, id. at 340. Judge

Hawkins deciphered the panel's decision to mean that Ms. Circu needed to present evidence before the BIA to establish that she had suffered prejudice. *Circu*, id. at 342. If so, the panel's decision is conflicts with this Court's precedent and the rules governing practice before the BIA. *Circu*, id. at 342.

The two mechanisms available to Ms. Circu to have introduced evidence before the BIA was through a, 1) motion to reopen, or 2) a motion to remand. 8 C.F.R. § 3.2, *redesignated*, 8 C.F.R. § 1003.2; *see Matter of Coelho*, 20 I. & N. 464, 471-474 (BIA 1992); *see also* BIA Practice Manual, §§ 5.6, 5.8. This Court has expressly rejected the proposition that it is incumbent on an asylum applicant to file a motion to reopen or remand with supporting evidence if she has been wrongly denied relief because the agency relied on country conditions evidence that was not part of the administrative record without providing her an opportunity to present rebuttal evidence. *See Castillo-Villagara*, 972 F.2d at 1029-1030; *see also Gomez-Vigil*, 990 F.2d at 1124-1125 (Circuit Judge Fletcher, concurring); 8 C.F.R. §§ 3.1 et seq.; *redesignated*, 1003.1; 3.9 et seq., *redesignated*, 1003.9 et seq. Indeed, for an alien to establish a due process violation she is not required to proffer "exactly what evidence [she] would have presented," but is required to "show only that the IJ's conduct 'potentially [affected] the

outcome of the proceedings.'" *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000).

Moreover, this Court's settled approach in the context of this case is supported by the designated purpose and procedural rules governing practice before the agency. Because the BIA is foremost an appellate body, and it is the Office of the Immigration Judge that is responsible for conducting the evidentiary hearing, the proper vehicle to challenge errors by the IJ is through an appeal; not a motion that is not designed "for direct consideration [of issues] on appeal" and amounts to a request for a new trial. *See Gomez-Vigil*, id. at 1124-1125 (Circuit Judge B. Fletcher concurring). Motions to reopen and remand, like motions are new trials, are in fact disfavored. *See Castillo-Villagara*, id.; *Gomez-Vigil*, id.; *see also Ramirez-Alejandre v. Ashcroft*, 319 F.3d at 375-376.

This Court and the Attorney General have noted that when the roles of the BIA and IJ are not clearly delineated, and litigants before the agency thus feel encouraged to introduce evidence and advance motions for remand and reopening, the result is chaotic and has been identified as the cause for the crushing backlog before the BIA. *See Ramirez-Alejandre*, id. at 374-377. The Attorney General has thus labored to crystallize the respective roles of the BIA and the IJ and manage the practice of motions to reopen and remand.

Id. As a result, the Attorney General has made clear that motions to reopen and remand are extraordinary *collateral* forms of relief and are not the instrument to address issues that are the proper subject matter of appeals. *Id.*; *see* United States Department of Justice (EOIR, BIA), "Questions and Answers Regarding Proceedings Before the Board," Part 3, at 31-32(Warning litigants that motions to remand should not be confused with requests for remand).

Unless corrected, the panel's cloudy departure from controlling precedent threatens to undo the clarity needed for both the efficient practice before the IJ and BIA. The panel's decision, if allowed to stand, now requires appellants to the BIA, who are presented with due process violations based on the improper reliance of out of record evidence, to not only raise the issue in their appeals and request remand, but then file a collateral motion with the BIA to present evidence. *Circu*, 398 F.3d at 940 (Appellant who raised issue before BIA in her appeal failed to establish prejudice because she had an opportunity to "challenge the report's contents.") Such a result is a regression and particularly ill-advised in light of the disorder it caused in the past.

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B. THE CONTENTS OF THE COUNTRY REPORTS EVIDENCES THE IMPORTANCE OF REMAND TO AFFORD MS. CIRCU AN OPPOPRTUNITY TO REBUT ITS CONENTS.

1. THE IJ WAS CORRECT IN NOT RELYING ON THE 1997 REPORT TO REBUT MS. CIRCU'S FEAR OF PERSECUTION & THE PANEL'S PERFUNCTORY CONCLUSION TO THE CONTRARY IS INEXPLICABLE.

The IJ did not rely on the 1997 Report to rebut Ms. Circu's eligibility for asylum. CAR 64-66. And for good reason. The 1997 Report identifies "[g]overnmental and societal harassment of religious minorities" as one of Romania's "serious [human rights] problems" CAR 256-257. In the section devoted to "Freedom of Religion," after making general observations about the constitutional protection with respect to religious freedom and noting that the "Government generally does not impede the observance of religious belief," the 1997 Report identified a litany of human rights abuses facing minority religions like Pentecostals. CAR 262-263. The 1997 Report states that "several Protestant denominations, Jehovah Witnesses the most prominent amongst them, continued to make *credible* allegations that low-level governmental officials and Romanian Orthodox clergy harassed them and impeded their efforts at proselytizing and worship." CAR 262 (emphasis supplied). Ms. Circu, as Pentecostal, falls within the category of protestants

who have a fear of persecution at the hands of government officials, albeit low-level, and the Orthodox Clergy. CAR 63.

Aside from its introductory comments in the "Freedom of Religion" section, there was nothing mitigating the 1997 Report that Ms. Circu had a fear of persecution in Romania. See CAR 256-269. In fact, the 1997 Report describes a larger context where "police continued to beat detainees" and ignored procedural due process with impunity, and a judiciary that was still not independent. CAR 256-261. In light of the fact that Ms. Circu had for years suffered at the hands of the Romanian police forces, and was receiving summons from them until fleeing her country in 1994, these dimensions of the 1997 Report were ominous. CAR 58-61.

As a result, the IJ aptly did not rely on the 1997 Report because it sets forth the type of evidence that is insufficient to rebut a refugee's well-founded fear of persecution. *See Borja v. INS*, 175 F.3d 732, 737-738 (9th Cir. 1999)(en banc)(Continuing human rights violations of the sort applicant fears fails to rebut presumption of well-founded fear of persecution.); *see also de Guinac v. INS*, 179 F.3d 1156, 1163-64 (9th Cir. 1999)(same); *Popova v. INS*, 273 F.3d 1251, 1259-1260 (9th Cir. 2001)(same). The panel's finding that the IJ should have relied on it is not only an overzealous

extension of judicial review not allowed under *Ventura*, but is also contrary to this Court's controlling precedent. *Id.*

2. THE PANEL WAS WRONG TO NOT AFFORD MS. CIRCU AN OPPORUNITY TO REBUT THE 1999 REPORT BECAUSE IT DOCUMENTS ROMANIA'S POOR HUMAN RIGHTS RECORD AND CONFIRMS ABUSE OF RELIGIOUS MINORITIES BY INDIVIDUALS THE GOVERNMENT IS UNWILLING OR UNABLE TO CONTROL.

The issue of changed country conditions is an individualized and debatable adjudicative factual issue and Department of State country reports are not necessarily dispositive on the question. *See Castillo-Villagara*, id. at 1028-29; see *also Chand v. INS*, 222 F.3d 1066, 1976-1079 (9th Cir. 2000); *see* Thus the opportunity for an asylum applicant to rebut its contents is fundamental to affording her a full and fair hearing. *Gonzalez*, 82 F.3d at 912. This case evidences the unassailable importance of this entrenched principle.

According to the introduction of the 1999 Report, societal harassment of religious minorities that the Romanian government is unable or unwilling to control remains a "serious [human rights] problem." U.S. Department of

State, "Country Reports on Human Rights Practices," p.1. [1] The 1999 Report section devoted to "Freedom of Religion" and it, not unlike the 1997 Report, discusses press reports of "adherents of minority religions" being "prevented by others from practicing their faith, and local law enforcement authorities did not protect them." Id. at 6. The only equivocating observations in the 1999 report are that the Romanian constitution guarantees freedom of religion and the "Government generally does not impede the observance of religious belief." Id. The balance of the snapshot of country conditions in Romania is not encouraging as it details abuses against minority religions. See id. One such reported incident occurred in Ms. Circu's county of Brasov where members of the Orthodox majority "aided by local police" drove Greek Catholics out of their church. Id. at 7.

Ms. Circu as a Pentecostal, practices a minority religion and, consequently, has suffered past persecution in Romania. The 1999 Report confirms that human rights abuses continue against minority religions without excepting Pentecostals. Id. at 1, 6-7. This court has never found that reports of general improvements in country conditions rebuts an alien well-founded fear of persecution where the specific evidence provides that the

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[1] The page numbers referenced in the report are based on undersigned counsel's print out of the 1999 Report from the Department of State's website at http://www.state.gov/g/drl/hr/c1470.htm.

human rights abuses against the applicant's category of individuals remains a problem. *See Borja*, 175 F.3d at 737-738; *de Guinac*, 179 at 1163-64; *Popova*, 273 F.3d at 1259-1260. Thus, the IJ's decision was in contravention with this Court's precedent, and at minimum, Ms. Circu is entitled to an opportunity to rebut the IJ's findings in accordance with the proper legal standards. *See Castillo-Villagara*, 972 F.2d at 1029-1031; *Sarria-Sibaja*, 990 F.2d at 443-444; *Gomez-Vigil*, 990 F.2d at 1113-1114; *Kahssai*, 16 F.3d at 324-325; *Getachew*, 23 F.3d at 845-848; *Gonzalez*, 82 F.3d at 910-912;

Although the panel did not rely on the IJ's analysis with respect to the 1999 Report to reach its decision, a review of it is warranted to crystallize the necessity of remand to allow Ms. Circu to have an opportunity to rebut its contents. In support of her finding that Ms. Circu's fear of persecution had been rebutted the IJ relied on the 1999 Report for the proposition that, "open worship is now possible and is only marred occasionally by unsanctioned harassment by local officials." CAR 65. The 1999 Report, however, never states that the marring by local officials of minority religions is so occasional that it is an aberration, but instead refers to press reports. *See Chand*, 222 F.3d at 1079 (Report that abuses occur "sometimes" not enough to rebut an asylum applicant's fear of persecution.) Later in her decision the IJ repeats her assumption that the persecution of minority

religions is an exception when she "acknowledges" that Baptists were attacked but then categorizes it as "one attack [that] was isolated in nature and not a recurring problem in Romania." CAR 66. This, of course, is flatly contradicted by the 1999 Report, that states that minority religions continued to be the subject of abuse and it remained an intractable human rights concern in Romania. *Salazar-Paucar v. INS*, 281 F.3d 1069, 1076 (9th Cir 2002)(Reports of abuses, without more, does not support inference that other abuses did not occur); *see also Chand*, id. at 1077(It "has never [been] assumed that all potentially relevant incidents of persecution in a country are collected in the State Department's documentation.") The IJ, compounds her error, by right after acknowledging the attack on the Baptists, and previously having discussed the difficulties of the Greek Catholic Church, incredulously proclaims that, "Even though there appears to still be sentiments amongst at least 86% of the population that the Romanian Orthodox church is the predominant church, there is no indication that the remaining 14% of the population is persecuted for their alternative spiritual views." CAR 66. The IJ's conclusion is inexplicable in light of the 1999 Report and her own citations to it. *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000)(Report of continuing abuses does not serve to rebut presumption of asylum eligibility). The sole point that the IJ is right about is that

Pentecostals are not specifically mentioned; however, what is important is that they are nowhere excepted in the 1999 Report that states that minority religions continue to suffer abuse. Significantly, in a case involving a Romanian national not dissimilar to this, the Court held that the applicant's fear of persecution was not rebutted. *See Gui v.* INS, 280 F.3d 1217, 1229 (9th Cir. 2002)(Statement that police continue to use excessive force enough to establish that report does not rebut Romanian national's fear of persecution.) In light of the fact that the burden is on the government to rebut Ms. Circu's fear of persecution, the fact that 1999 Report states that human rights abuses against minority religions are a problem, and Pentecostals are a minority religion, the 1999 Report, as Judge Hawkins argues, "is hardly resounding proof that conditions have changed sufficiently to rebut Circu's statutory presumption of future persecution on account of her religious beliefs." *Circu*, 389 F.3d at 943.[2]

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[2] A revealing dimension of the IJ's decision appears at the conclusion of her analysis with respect to changed country conditions. The IJ stated that "there is no doubt that Respondent has suffered while living in Romania," but held that "events surrounding Respondent's life in Romania do not compel a finding that she will suffer future persecution on one of the protected grounds enumerated in the statute." CAR 66. However, because "there is no doubt that Ms. Circu has suffered" and thus she is a refugee, she was not required to provide evidence that compelled a finding that she will suffer future persecution. *See Borja*, 175 F.3d at 737-738. The burden was on the government to rebut the presumption and the evidence in the record fails to do so. *Id.*

Ms. Circu was at least entitled to an opportunity to rebut the 1999 report. And as discussed above, the panel's decision denying her that opportunity conflicts with this court's precedent. *See supra.*

3. THE IJ'S DECISION WITH RESPECT TO RELOCATION WITHIN ROMANIA IS WHOLLY INADEQUATE AS THE IJ DID NOT AFFORD MS. CIRCU THE PRESUMPTION THAT SHE CANNOT LOCATE WITHIN ROMANIA AND DID NOT EVALUATE THE REASONABLENESS OF EXPECTING HER TO DO SO.

The panel afforded little attention to the IJ's finding that Ms. Circu's fear of persecution was also rebutted on the grounds that she could relocate within Romania. *See Circu*, 389 F.3d at 941; CAR 66. As in the case with the issue of changed country conditions, because Ms. Circu suffered past persecution, the burden was on the government to prove *both* that she could relocate safely within Romania, and that relocation would be reasonable. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1070-1071 (9th Cir. 2003); see also 8 § C.F.R. 1208.3(b)(3). The IJ, without discussing any presumptions or assigning any burdens, held that, "With the inclusion of freedom of religion in the Romanian constitution, Respondent has a legally protectable right to practice her faith," and thus could safely relocate within Romania. CAR 66.

"The IJ's one sentence comment and the sparse evidence in the record regarding the possibility of internal relocation," does not rebut the presumption that Ms. Circu cannot avoid future persecution by relocating within Romania. *Hasan*, 380 F.3d at 1122, *citing*, *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003). Furthermore, the IJ's requirement that Ms. Circu prove that she "cannot relocate" instead of requiring that the government establish that she can, evinces that the IJ did not afford her the presumption that she is entitled. *See Mashiri v. Ashcroft*, 283 F.3d 1112, 1123 (9th Cir. 2004).

Finally to the extent that the IJ addressed the issue relocation her analysis was deficient to satisfy "the significant showing required to demonstrate the *reasonableness* of internal relocation." *Hasan* id. at 1122. Like the issue of avoiding future persecution by relocating, "it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence, that, under all the circumstances, it would be reasonable to relocate." 8 C.F.R. § 208.13(b)(3)(ii), *redesignated*, § 1208.12(b)(3)(ii); see also § 208.16(b)(3)(ii), *redesignated*, § 1208.16(b)(3)(ii) .

The IJ did not discuss the regulations that govern the analysis of relocation and the factors the regulations require the IJ to consider See 8

C.F.R. § 208.13(b)(3); *see also Melkonian v. Ashcroft*, 320 F.3d 1061, 1070-71 (9th Cir. 2003)(IJ's failure to consider factors as reasonableness of relocation under applicable regulations required reversal of decision.) There is no evidence that Ms. Circu has any meaningful ties outsider of Brasov. The only discussion in the IJ's decision regarding the whereabouts of her immediate family states that her parents are in the United States. CAR 61. Thus, the IJ's failure to consider the relevant factors in this case resulted in her ignoring that each applicable one counsel against finding that it would be reasonable for Ms. Circu to relocate. *See Melkonian*, id.; *see also Mashiri*, id.

The panel's upholding the IJ's scanty analysis with respect to internal relocation conflicts with this Court's precedent because it ignored the IJ's placing the burden on Ms. Circu to prove that she "cannot" relocate, and not analyzing the reasonableness of relocation. *Id.* The panel's failure to remand the proceedings to allow Ms. Circu to challenge the IJ's finding under the correct legal standard warrants *en banc* consideration.

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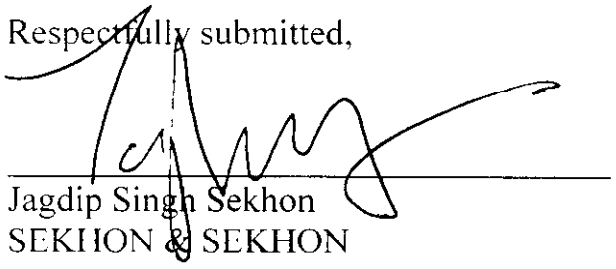
CONCLUSION

For the reasons set forth above, pursuant to Federal Rules of Appellate Procedure 35, petitioner Violeta Circu seeks rehearing *en banc* of the panel's decision in *Circu v. Ashcroft*, 389 F.3d 938 (9th Cir. 2004).

Dated: January 6, 2005
San Francisco, Ca

Respectfully submitted,



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02

No. 03-73420

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIOLETA CIRCU

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS
Agency No. A73-415-760

RESPONDENT'S OPPOSITION TO PETITIONER'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

This Court should deny the Petitioner's petition. The panel's decision is correct, and Petitioner has failed to establish that the panel overlooked or misapprehended points of law, or that rehearing is necessary to maintain uniformity with the law of the Supreme Court or this Circuit. See Fed. R. App. P. 35, 40. The panel's decision stands for the unremarkable proposition that an Immigration Judge ("IJ") did not abuse her discretion or violate due process in taking administrative notice of facts in a 1999 Department of State Report that are not substantially different from facts in the record of a 1998 asylum hearing which Circu herself put into evidence at the hearing. That being the case, Circu's arguments that the IJ denied asylum based on new facts regarding country conditions of which Circu had no notice or opportunity to respond is a "red herring." In addition, Circu had notice and opportunity to rebut the facts of which the IJ took administrative notice, in the context of her appeal to the Board of Immigration Appeals ("Board"). Contrary to Circu's misassertion, the Board was not solely an appellate tribunal at the time of Circu's appeal. The Board had full de novo factfinding authority as to all issues, could consider new evidence tendered on appeal, and could take administrative notice of any facts that Circu sought to raise in rebuttal of the IJ's administrative notice. Moreover in her appeal to the Board Circu disputed the contents of the 1999

Report, the taking of administrative notice of that report, and the IJ's finding of changed country conditions. Circu's argument that the panel violated INS v Ventura, 537 U.S. 12 (2002), and its progeny is incorrect and misapprehends Ventura. Given Circu's challenge to the legality of the administrative notice, and the Board's streamlined decision, the Board is presumed to, and necessarily must have decided that administrative notice was correct or if error, was harmless and did not violate due process. The panel did not usurp or take away the Board's authority to decide these questions in the first instance - which is the judicial conduct that Ventura prohibits. The panel simply reached the same conclusions that the Board necessarily reached when it streamlined the appeal. Finally, Circu's substantial-evidence challenge to the findings of changed country conditions and no well-founded fear of future persecution do not warrant rehearing or rehearing en banc. The panel's assessment of the sufficiency of evidence is consistent with several published decisions.

BACKGROUND

Violeta Circu is a female native of Romania in removal proceedings, who at two hearings before an IJ in July 1998 applied for asylum and withholding of removal, based on a claim of past persecution and fear of future persecution by the Romanian government, on account of her Pentecostal religion and

political views and activities opposing the former Communist regime. AR 58-64. The evidence at the asylum hearing established that Circu is a member of a prominent Pentecostal family in Romania which was persecuted by the former Communist government that persecuted many religions and political opponents, and was violently overthrown in the late 1980's. AR 58-64. Circu submitted scores documentary evidence regarding country conditions following the overthrow of the former Communist Government, including four State Department reports on the subject. AR 242-392. The asylum hearing ended in 1998. AR 58. In August 2000, the IJ issued her written decision finding that Circu established past religious and political persecution under the former Communist regime, giving rise to a regulatory presumption of a well-founded fear of future persecution. AR 57-67. However, the IJ found that this presumption was rebutted by changed country conditions following the overthrow of the Communist government. AR 57-67. In making this determination, the IJ took notice of matters in a 1999 Department of State report that was not in the record at the time of the 1998 asylum hearing. AR 64-66. Given the finding of changed country conditions, the IJ denied the applications for asylum and withholding of removal. AR 66-67. Circu appealed to the Board, disputing the facts in the 1999 Report in her notice of appeal, and challenging the legality of the administrative notice and the

sufficiency of the evidence to support the finding of changed conditions. AR 11-33, 5-53. The Board streamlined the appeal. AR 1. In a published decision, a divided panel of this Court (O'Scannlain, Siler, Hawkins) affirmed the denial of asylum and withholding of removal and the legality of the IJ's administrative notice. Circu v. Ashcorft, 89 F.3d 938 (9th Cir. 2004). The panel concluded that the IJ's error, if any, in taking administrative notice of the matters in the 1999 report was harmless, and there was no abuse of discretion or violation of due process, because: (1) there were no significant differences between the information in the 1999 Report and information in a 1997 Report in the record, and (2) Circu necessarily had notice, and the opportunity to respond on appeal to the Board. Id. at 940. The dissenting panel member disagreed, concluding that the 1999 Report may have materially affected the IJ's decision; Circu did not have adequate notice or opportunity to respond to the administrative notice; and the country condition evidence did not necessarily show changed conditions. Id. at 941-43.

ARGUMENT

I. THE PANEL'S DECISION UPHOLDING ADMINISTRATIVE NOTICE IS CORRECT AND CIRCU HAS NOT ESTABLISHED THAT REHEARING EN BANC IS WARRANTED TO MAINTAIN UNIFORMITY WITHIN THE CIRCUIT

1. Because of the variety of kinds of facts subject to administrative notice and their significance in any given case, the "agency [has] discretion, subject to review for abuse of

discretion, not only to take notice, but also for whether to allow rebuttal evidence and even for whether the parties must be notified that notice will be taken." Castillo-Viallagra v. INS, 972 F.2d 1017, 1028 and n. 5 (9th Cir. 1993). An alien must "a fair opportunity to rebut the proposition of which notice is taken." Id. at 1029. The agency may take administrative notice of facts without violating due process so long as the alien has notice and a reasonable opportunity to dispute the noticed facts or proposition they support. See Kazlauskas v. INS, 46 F.3d 902, 906 n. 4 (9th Cir. 1995) (IJ did not err or violate due process in taking administrative notice of changed country conditions, where they were at issue at the hearing, alien argued that despite changed conditions he had a well-founded fear, and IJ considered nature of changes); Acewicz v. INS, 948 F.2d at 1061, n. 13 (9th Cir. 1993) (Board "did not abuse its discretion in taking administrative notice of the changed conditions in Poland and of the effect of those changes" where aliens "had ample opportunity to argue before the immigration judges and before the Board . . . that their fear of persecution remained well-founded, despite [the changes]"); Kotasz v. INS, 31 F.3d 847, 855 n. 13 (9th Cir. 1994) (Board did err in using administrative notice to consider new political developments when aliens "had notice of the political changes in Hungary prior to their [IJ] hearing and . . . were given ample opportunity to discuss the effect of those

changes on their asylum claim"). If the Board takes administrative notice of facts in its final decision without first affording an alien notice and an opportunity to respond, this violates due process. See Castillo-Villagra, 972 F.2d at 1026-1031; Getachew v. INS, 25 F.3d 841, 846-47 (9th Cir. 1994); Kahssai v. INS, 16 F.3d 323, 324-25 (9th Cir. 1994); Gomez-Vigil v. INS, 990 F.2d 111, 1114 (9th Cir. 1993). The panel correctly concluded, in accordance with this law, that the IJ's administrative notice was harmless, was not an abuse of discretion, and did not violate due process. See Circu, 389 F.3d at 940.

2. The panel correctly concluded that there were "no significant differences" between the facts in the 1999 Report of which the IJ took notice and information in the record created at the 1998 asylum hearing. Id. The IJ cited the 1999 Report as authority for the proposition that "Pentecostal is a minority religion in Romania, a country in which eighty-six percent of the population belongs to the Romanian Orthodox Church." AR 64, and n. 2. The IJ also cited the 1999 Report for the proposition that "[e]ven though there appears to still be sentiments among at least 86% of the population that the Romanian Orthodox church is the predominant church, there is no indication that the remaining 14% of the population is persecuted for their alternative spiritual views." AR 66. The noticed fact that 86% of the

population is Romanian Orthodox was already in evidence in two reports at the 1998 asylum hearing.[1] The noticed information that there was no showing of religious persecution for the remainder of the population was already in evidence in four reports at the 1998 hearing.[2] The IJ also quoted the 1999 Report, stating: "Reports on country conditions in Romania indicate that religious freedom is generally allowed: '[t]he [C]onstitution provides for religious freedom, and the Government generally does not impede the observance of religious belief.'" AR 64. This noticed language from the 1999 Report is identical to language in three reports in evidence at the asylum hearing.[3]

The IJ took notice that the 1999 Report shows that "the Romanian Government recognizes fourteen religions whose clergy receive state financial support." AR 64. This noticed language

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[1] See AR 373 (1996 Country Report on Human Rights Practices stating: "[t]he Romanian Orthodox Church, to which approximately 86% of the population nominally adheres, predominates"); AR 262 (1997 Report on Human Rights Practices (same)).

[2] See AR 373 (1996 Country Report on Human Rights Practices containing no report of religious persecution); AR 262 (1997 Report on Human Rights Practices (same)); AR 346 (July 1997 Report to Congress On Religious Freedom (same)); AR 336 (January 1997 Profile of Asylum Claims, stating same and also sating that since the downfall of the Communist regime the religious situation "has been transformed").

[3] See AR 373 (1996 Country Report on Human Rights Practices stating: "[t]he Constitution provides for religious freedom, and the Government does not generally impede the observance of religious belief"); AR 262 (1997 Country Report on Human Rights Practices (same)); AR 346 (July 1997 Report to Congress On Religious Freedom (same)).

is essentially identical to language in three reports in evidence at the asylum hearing.[4]

The IJ also stated: "The January 1997 Profile of Country Conditions issued by the Department of State [in the record] states that Pentecostals and other unregistered sects had a difficult time in Romania." AR 65. The IJ then followed this with a citation to the 1999 Report for the proposition that "open worship is now possible and is only marred occasionally by unsanctioned harassment by local officials." AR 65. This noticed information and quotation is substantially similar to information in three reports in evidence at the asylum hearing.[5] The IJ took notice that "[r]eligious organizations which are not officially recognized are not permitted to build churches." AR 66. This noticed fact was in three reports in evidence at the asylum

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[4] See AR 373 (1996 Country Report on Human Rights Practices stating that the Government "recognizes 15 religions whose clergy receive financial report"); AR 262 (1997 Country Report on Human Rights Practices (same)); AR 346 (July 1997 Report to Congress On Religious Freedom (same)).

[5] See AR 336 (January 1997 Profile of Country Conditions stating that under the former Communist regime "Pentecostals and other unregistered sects in particular had a difficult time . . . . Fortunately the situation has been transformed, although it is marred occasionally by unsanctioned harassment by local officials that impedes worship and proselytizing"); AAR 262 (1997 Country Report on Human Rights Practices stating that "several Protestant denominations, Jehovah's Witnesses the most prominent among them, continued to make credible allegations that low-level government officials and Romanian Orthodox clergy harassed them and impeded their efforts at proselytizing and worship"); AR 373 (1996 Country Report On Human Rights Practices (same)).

hearing.[6]

Finally, the IJ cited the 1999 Report as support for her assessment that "country conditions have changed and new freedoms of worship are available since the removal of the Communist regime," and "[w]ith the inclusion of freedom of religion in the Romanian constitution, [Circu] has a legally protectable right to her Pentecostal faith." AR 65. This assessment is essentially the same as in two reports in evidence at the asylum hearing.[7]

Thus, as the panel concluded, the matters in the 1999 Report of which the IJ took notice were not substantially different than the evidence of country conditions at the 1998 hearing. Given this record, Circu's assertions that the IJ decided the asylum claim without Circu having notice of the country conditions that were the basis of the IJ's decision - because the IJ relied on evidence in a 1999 Report not in existence at the time of the

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[6] See AR 373 (1996 Country Report on Human Rights Practices stating that state registered religious organizations that are not recognized religions"may not found churches"); AR 262 (1997 Country Report on Human Rights Practices (same)); ARA 346 (July 1997 State Department Report to Congress On Religious Freedom (same)).

[7] See AR 336 (January 1997 Profile Of Asylum Claims stating: "the revolution brought freedom of religion following decades of Communist efforts to control and minimize religion in national life. Pentecostals and other unregistered sects in particular had a difficult time . . . . Fortunately the situation has been transformed. . . ."); AR 161 (1997 Country Report On Human Rights Practices stating: "The Constitution provides for religious freedom, and the Government generally does not impeded the observance of religious beliefs").

hearing - is misleading. This obscures that the facts and information in the 1999 Report of which the IJ took notice are substantially similar, and in many cases identical, to facts in reports which Circu herself put in the record at the 1998 asylum hearing. This is the point the panel correctly made when it stated that there were "no significant differences" between the matters in the 1999 Report and the information in the record.[8] Circu, 389 F.3d at 940.

2. As the panel also correctly concluded, Circu "must have had notice that the IJ relied on the 1999 Report because she raised this issue on appeal to the [Board]; therefore, she also had the opportunity to challenge the report's contents." Id. This is consistent with this Court's case law holding that there is no violation of due process in taking administrative notice where the alien has the opportunity to argue against the facts or proposition noticed before the IJ or Board. See Kazlauskas, 46 F.3d 906 n. 4; Acewicz, 948 F.2d at 1061. Circu's argument that she had no opportunity on appeal to rebut the facts of which the IJ took notice because the Board is an exclusively appellate tribunal, is incorrect. Circu's appeal was filed at the Board in 2000. AR 52. Therefore, her appeal was not subject to the

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[8] Thus, on close examination of the facts, the concerns raised by the dissenting panel member that the 1999 Report "materially affect[ed]" the IJ's decision and unfairly prejudiced Circu does not reflect what actually transpired. See Circu, 398 F.3d at 943.

current procedural scheme that applies to appeals filed after September 25, 2002. See Board Procedural Reforms, 67 Fed. Reg. 54878, 54898-99 (Aug. 25, 2002); 8 C.F.R. §§ 1003.1(d)(1), (d)(3), (e)(4)-(6). (2004). The Board's authority and scope of appellate review for Circu's appeal is described in Ramirez-Alejandre v. Ashcroft, 319 F.3d 365, 370-73, 380-82 (9th Cir. 2003). As that decision discusses, the Board was not strictly an appellate body at the time of Circu's appeal. Id. at 372-73. The Board had full de novo factfinding authority as to all issues, id., which would include factual determinations regarding rebuttal of administrative notice. The Board also had authority to consider new evidence tendered on appeal. Id. at 371-73. And the Board had authority to take administrative notice of matters such as the 1999 Report, or any rebuttal evidence Circu might ask to be noticed.[9] See Castillo-Villagra, 972 F.2d at 1028. In

[9] The Board also had authority to remand Circu's case to the IJ to permit rebuttal before her, instead of before the Board. See Ramirez-Alejandre, 319 F.3d at 383 (discussing Board's remand authority). Contrary to Circu's assertions, the panel correctly distinguished Narayan v. Ashcroft, 384 F.3d 1065 (9th Cir. 2004). That decision holds that when an alien files both an appeal and an independent motion to reopen pertaining to a matter apart from the appeal, the Board should independently review the motion. This does not apply to Circu's case, since she never made a formal motion to remand, and any remand request would have been for the same matter that was the basis of her appeal.

Circu's argument that under Ninth Circuit case law a motion to reopen or remand is not a sufficient remedy for administrative notice is misleading. The case law she cites is inapposite. It holds that a motion to reconsider filed after the Board has issued its decision, which disputes the Board's taking of administrative notice, is not an appropriate remedy for the

addition, Circu used her notice of appeal to the Board to rebut the contents of the 1999 Report of which the IJ took notice, disputing the facts and assessments in that Report. AR 53. Circu also filed an extensive brief with the Board challenging the propriety of administrative notice and the IJ's finding of changed country conditions. AR 24-32. Given these facts the panel's determination that Circu had notice and opportunity to rebut the IJ's administrative notice is correct and consistent with the law of the Circuit, and does not warrant en banc rehearing.

II. THE PANEL'S DECISION DOES NOT CONFLICT WITH VENTURA OR THE LAW OF THIS CIRCUIT, AND CIRCU'S OTHER CLAIMS DO NOT ESTABLISH ANY QUESTIONS OF EXCEPTIONAL IMPORTANCE

1. Circu's contention that the panel violated Ventura, 537 U.S. at 15-17, and its progeny by allegedly making findings not made by the agency (the reasonableness of the administrative notice and harmlessness of any error) is not well taken. Circu's appeal to the Board challenged the legality of the administrative notice and contended this violated due process. The Board streamlined, affirming the IJ's decision without opinion. Under the streamlining regulation, this was permitted only if the result of the IJ's decision were correct and any errors were

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Board's administrative notice. Castellon-Villagra, 972 F.2d at 1029. This has no bearing on the administrative notice in Circu's case, which was taken by an IJ, with an opportunity to rebut available on appeal to the Board.

harmless. Carriche v. Ashcroft, 350 F.3d 845, 851 (9th Cir. 2003); 8 C.F.R. § 3.1(a)(7)(2002). Given the presumption of regularity, the Board is presumed to have followed its regulation. Larita-Martinez v. INS, 220 F.3d 1092, 1095 (9th Cir. 2000). Therefore, the Board is presumed to have decided that the IJ's administrative notice was correct, or if error, was harmless with no violation of due process. Circu then raised an identical legal and constitutional challenge to administrative notice on review, which the Court reivews de novo. Lopez-Urenda v. Ashcroft, 345 F.3d 788, 791 (9th Cir. 2003). The panel reviewed these claims and concluded that while the IJ should have referred to the 1997 Report in the record, this was "only harmless or nonmaterial error" and there was no abuse of discretion, and that Circu "had notice" and "the opportunity to challenge the report's contents." Circu, 389 F.3d at 940. Accordingly, the panel decided the same claims as to the legality of the administrative notice, and its harmlessness, that the Board is presumed to have decided by streamlining the appeal. The panel did not usurp the Board's authority to decide these questions in the first instance, which is what Ventura prohibits.[10]

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[10] By streamlining the appeal, the Board did not produce a visible decision as to Circu's claims of legal error regarding the administrative notice, because the Board designated the IJ's decision as the final agency position. This Court has indicated that it may remand a case to the Board for jurisprudential reasons, to clearly state its resolution of the issues, where streamlining leaves the Court without a clear decision to review.

2. Circu's substantial-evidence challenge to the sufficiency of the country reports (including the contents of the 1999 Report) to support the IJ's finding of changed country conditions rebutting the past-persecution presumption and showing no well-founded fear of future persecution in Romania does not warrant rehearing or rehearing en banc. The panel reasonably determined that the evidence shows a fundamental change in conditions in Romania since the overthrow of the violent, anti-religious Communist regime in the lat 1980's under which Ciru, her family, and others were persecuted. The panel's conclusion that the changed country conditions support the finding of no well-founded fear of future persecution is consistent with numerous other decisions involving Romanian asylum claims finding no such fear based on current country conditions. See, e.g., Simtion v. Ashcroft, 393 F.3d 733, 736 (7th Cir. 2004); Roman v. INS, 233 F.3d 1027, 1036 (7th Cir. 2000); Pop v. INS, 279 F.3d 457, 461 (7th Cir. 2002); Marcu v. INS, 147 F.3d 1078, 1081 (9th Cir. 1998); Dobrican v. INS, 77 F.3d 164, 166 (7th Cir. 1996); Anton v. INS, 50 F.3d 469 (7th Cir. 1995). Finally, as a matter of law, the finding of changed country conditions is sufficient

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Lanza v. Ashcroft, 389 F.3d 917, 926, 928 (9th Cir. 2004). However, in this case, jurisprudential considerations do not warrant remand. See generally, Kasnecovic v. Gonzales, 400 F.3d 812, 815-16 (9th Cir. 2004). It would be redundant for the Board tore-state what the Court has already concluded and what the Board is presumed to, and necessarily must have concluded, when it streamlined the appeal. See id.

in itself to rebut the past persecution presumption. See 8 C.F.R. § 1208.13(b)(1)(i)(A) Therefore, Circu's challenge to the alternative means of rebutting that presumption (reasonable relocation elsewhere) is moot and of no legal consequence. See 8 C.F.R. § 1208.13(b)(1)(i)(B).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing with suggestion for rehearing en banc.

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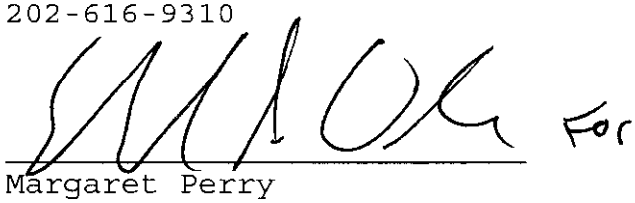

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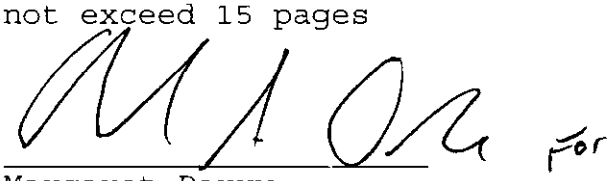

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May 2005, two copies of this RESPONDENTS' OPPOSITION TO PETITIONER'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, was served on Petitioner's counsel by first class mail, postage prepaid, addressed to:

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

02-73420

VIOLETA CIRCU,

Petitioner,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL FOR THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REVIEW FROM BOARD OF IMMIGRATION APPEALS
(A 73 415 760)

SUPPLEMENTAL BRIEF IN SUPPPORT OF PETITION FOR REHEARING

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INTRODUCTION

Recent precedent since the filing of Violeta Circu's petition for rehearing *en banc* confirms that the panel's decision both creates a conflict within this Court's law and raises issues of exceptional importance.

ARGUMENT

A. THIS COURT'S RECENT PRECEDENT REGARDING ALLEGED DUE PROCESS VIOLATIONS ESTABLISHES THAT MS. CIRCU WAS ENTITLED TO AN EVIDENTIARY HEARING BY VIRTUE OF THE FACT THAT THE IJ RELIED EXCLUSIVELY ON THE 1999 *COUNTRY REPORT*, AND THAT MS.CIRCU APPROPRIATELY RAISED THE ISSUE BEFORE THE BOARD OF IMMIGRATION APPEALS.

1. This Court continues to steadfastly hold that when an alien is denied an opportunity to rebut evidence that results in the agency reaching a legal conclusion, her due process rights have been violated and the appropriate remedy is remand for an evidentiary hearing.

Lopez-Umanzor v. Gonzales, 405 F.3d 1049 (9th Cir. 2005), involved a female respondent in removal proceedings who sought cancellation of removal as a battered spouse before the Office of the Immigration Judge ("IJ"). *Id.* at 1051. During the course of her removal hearing, the IJ refused to hear expert testimony regarding the credibility of respondent's allegations of domestic violence. He did, however, state that in lieu of the testimony, he would weigh the experts' written reports. *Id.* at 1051-53. The IJ denied the

respondent relief based on the grounds that he doubted her credibility with respect to her allegations of suffering domestic violence and that he had reason to believe that she had been involved in drug trafficking -- an immigration judge's belief that an alien is involved in drug trafficking is a bar to the relief respondent was seeking. *Id.*

This Court reversed the IJ's decision, concluding that his refusal to hear expert testimony constituted a due process violation. *Id.* at 1057-1059. The Court reasoned that expert testimony may have affected the IJ's credibility finding, and thus the respondent was prejudiced by the denial of an opportunity to present that testimony. *Id.* In reaching its conclusion, the Court rejected the government's argument that there was no prejudice to the respondent because whether or not respondent established that she was a victim of domestic violence, the IJ still would have found that she was barred from relief based on the grounds he had "reason to believe" that she participated in drug trafficking. *Id.* The Court explained that it would not speculate how the experts' testimony may have impacted the IJ's assessment of the respondent's credibility, both with respect to her allegations of domestic violence, and her denials of involvement in drug trafficking. *Id.* The Court remanded the proceedings for an evidentiary hearing to allow the

expert testimony based on the grounds that it *may* affect the outcome of the case. *Id.*

The Court's holding in *Lopez-Umanzor* is consistent with other decisions issued by this Court since the filing of the underlying petition reiterating that a respondent in removal proceedings need only establish that the denial of an opportunity to present evidence may have affected the outcome of the case. See *Lopez-Umanzor*, id. at 1049, 1058; *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005); *Mohammed v. Gonzales*, 400 F. 3d 785, 794 (9th Cir. 2005); *Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1163-1164 (9th Cir. 2005).

The primary rationale for the *Circu* panel's decision collides with this Court's jurisprudence with respect to determining whether a respondent in removal proceedings suffered prejudice as a result of a due process violation. The panel determined that there were "no significant differences" between the two United States Department of State's *Country Reports* in question: the 1997 *Country Report* that was in evidence when the case was submitted; and the 1999 *Country Report*, that was not in the record, but served as the basis of the IJ's legal conclusion that Ms. Circu's presumed well-founded fear of persecution was rebutted. *Circu v. Ashcroft*, 389 F.3d 938, 940 (9th Cir. 2004). The panel majority found that Ms. Circu suffered

no prejudice by not having an opportunity to rebut the 1999 *Country Report* because the IJ "*should have*" relied on the 1997 *Country Report*. *Id.* (emphasis supplied). As respondent explains in its opposition, the panel believed that the focus on Ms. Circu's failure to rebut the 1999 *Country Report* is a "red herring" because it is "substantially similar, and in many cases identical" to the 1997 *Country Report*. Opposition at 10.

What is paramount, however, is that the IJ expressly did not rely on the 1997 *Country Report*, as best evidenced by the panel's imploring that she "should have." *Id.* As a result, in analyzing whether Ms. Circu suffered prejudice, the panel did far more than engage in speculation with respect to how the IJ may have weighed evidence, something this Court in *Lopez-Umanzor* understood as improper and refused to do. In contravention of *Lopez-Umanzor*, the panel found no prejudice by re-deciding the case for the IJ. Prejudice cannot be swallowed by a circuit court supplanting the IJ's reasons for denying respondent's relief with reasons of its own. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)("Judicial judgment cannot be made to do service for an administrative judgment."); see *also*, *e.g.*, *Gonzales v. INS*, 82 F.3d 903, 910-912 (9th Cir. 1996)(Court finding prejudice and refusing to extrapolate the basis for agency's finding that applicant's fear of persecution had been rebutted.)

As the court in *Lopez-Umanzor* instructs, "we cannot be sure that the IJ would have reached a different conclusion, ... [b]ut our cases do not require absolute certainty." *Lopez-Umanzor*, *id.* at 1059. In other words, the issue is not whether the IJ's ultimate conclusion will be affected by affording Ms. Circu her opportunity to present evidence to rebut the 1999 *Country Report*, but that it "may." *Lopez-Umanzor*, id.; *see also Biwot*, id. 1100; *Salgado-Diaz*, id.

Ultimately, the panel's focus, and respondent's emphasis in its opposition, on the similarities between the 1997 and 1999 *Country Reports* is misplaced because the IJ did not note any such similarities. Certified Administrative Record ("CAR") 85. Significantly, the IJ relied exclusively on the 1999 *Country Report*. Equally significantly she contrasted it with the existing evidence in the record, which included the 1997 *Country Report*. CAR 85, 333. Although the IJ never explained her rationale not to rely on the 1997 *Country Report* but instead to rely on the 1999 *Country Report* to find that Ms. Circu's fear of persecution had been rebutted, she certainly had grounds for doing so as the former specifically mentioned "*governmental* ... harassment of religious minorities" as a "serious" human rights problem,

while the latter, published two years later, focuses on "societal harassment."[1] (emphasis supplied) CAR 257; 1999 *Country Reports*, p.1.[2] *See Gonzales*, 82 F.3d at 910-11(Emphasizing that the fact that agency may have relied on passage of time in finding that applicant's fear of persecution dissipated "may have" been correct, but, nevertheless before such a conclusion is

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[1] Respondent attempts to obfuscate that the *Country Report* the IJ relied upon was published nineteen (19) months after she had closed evidence, and two years after the *Country Report* that was part of the record.

[2] Respondent asks that this Court ignore the established principle that any analysis with respect to how changed country conditions may impact a refugee's continuing fear of persecution be individualized, and proceeds to cite a number of cases where Romanian asylum applicants were denied relief, in part, based on current country conditions. Opposition at 14; *see Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004)(Analysis with respect to changed country conditions requires an "individualized analysis.")

Notably, all the cases cited by respondent, but one, involve Romanians who did not suffer past persecution unlike Ms. Circu, and thus were not presumed to have a well-founded fear of persecution. *See Anton v. INS*, 50 F.3d 469, 472-73 (7th Cir. 1995); *Dobrican v. INS*, 77 F.3d 164, 167-168 (7th Cir. 1996); *Roman v. INS*, 233 F.3d 1027, 1035 (7th Cir. 2000); *Pop v. INS*, 279 F.3d 457, 461-62 (7th Cir. 2002); *Simtion v. Ashcroft*, 393 F.3d 733, 736-37 (7th Cir. 2004).

The only case that involved a Romanian who a circuit court found to have suffered past persecution but determined his well-founded fear of persecution had been rebutted was *Marcu v. INS*, 147 F.3d 1078, 1081-82 (9th Cir. 1998). However, evening the score, subsequently this Court found in, *Gui v. INS*, 280 F.3d 1217, 1229-1230 (9th Cir. 2002), that a Romanian refugee's well-founded fear of persecution was not rebutted by current country conditions.

reached applicant is entitled to an evidentiary hearing to attempt to prove otherwise.)

The 1999 *Country Report* was not in the record and the IJ nonetheless relied on it to reach a legal conclusion resulting in denying Ms. Circu relief. As this court has restated recently in *Theagene v. Gonzales*, 05 C.D.O.S. 5145 (9th Cir. 2005), the lack of Ms. Circu's opportunity to rebut the 1999 *Country Report*'s contents, has long been recognized to amount to a due process violation that warrants remand for an evidentiary hearing. *Id.* at 5146-47 ("In *Gonzalez* and *Castillo-Villagara*, we concluded that the Board's decision to make legal judgments on the basis of facts of which the Board took administrative notice violated an alien's due process where the Board failed to give the alien an opportunity to respond."); *see also Lopez-Umanzor*, 405 F.3d at 1058-1059 (The appropriate remedy for due process violation is remand for an evidentiary hearing); *Biwot v. Gonzales*, 403 F.3d at 1100(Same); *Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1163-64 (9th Cir. 2005)(Same).[3]

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[3] In its opposition respondent cites a number of cases where the agency took administrative notice of facts derived from evidence that the respondent had the opportunity to rebut during the hearing before the IJ. *See. e.g., Acewicz v. INS*, 984 F.2d 1056, 1059-1060 (9th Cir. 1993)(Issue of change in government was noticed and debated before IJ and therefore BIA's noticing of change of government did not deny alien due process, and alien had opportunity to rebut any and all evidence relied upon by agency for

2. Ms. Circu was correct to raise the issue of a due process violation before the BIA, and her exhaustion of her administrative remedies does not establish that she was afforded an "opportunity" to rebut the 1999 *Country Report.*

The second component of the panel's decision that the dissenting member rightfully derided but respondent supports as correct, is its finding that Ms. Circu, "must have had notice that the IJ relied on the 1999 Report because she raised this issue on appeal to the BIA; therefore, she also had the opportunity to challenge the report's contents." *Circu*, 389 F.3d at 940. Neither the panel nor respondent identify what constituted "the opportunity." *See id.*; Opposition at 10-12. No less importantly, the panel nor respondent explain how Ms. Circu's raising the due process issue before the BIA was an insufficient means to request remand for an evidentiary hearing, and, additionally was evidence that she ostensibly failed to exhaust an administrative remedy.

The unassailably proper instrument for an alien who has suffered a due process violation that results in a removal order is an appeal to the BIA,

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its finding.); *Kotasz v. INS*, 31 F.3d 847, 855 fn. 13 (9th Cir. 1994)(Same); Kazlauskas *v. INS*, 46 F.3d 902, 905, fn. 4 (9th Cir. 1995)(Same). This of course is distinguishable from a case such as Ms. Circu's where the IJ took notice of out of record evidence to reach a legal conclusion regarding "controversial or individualized facts." *See Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994)(Before reaching a legal conclusion, applicant must have an opportunity to rebut evidence); *see also Gonzales v. INS*, 82 F.3d 903, 911-913 (9th Cir. 1996) (Same).

requesting remand for a new evidentiary hearing. *See Lopez-Umanzor*, 405 F.3d at 1053 (Court of Appeals has jurisdiction over issue of due process violation of alien who was denied opportunity to present testimony before IJ and then raised issue before BIA.); *see also Biwot*, 403 F.3d at 1097-1098 (Court of Appeals has jurisdiction over issue of whether alien was denied right to counsel and opportunity to present evidence by IJ when he raised issue in notice of appeal to BIA.) Conversely, if Ms. Circu had not raised the issue before the BIA through an appeal she would have failed to exhaust her administrative remedy. *See Biwot*, id. (Noting that an alien is required to raise issue of an alleged due process violation by IJ through appeal before BIA.) Thus, by aptly challenging the IJ's decision with the BIA she employed the sole administrative remedy available to her. *See Biwot*, id.; see also 8 C.F.R. § 3.1(b), *redesignated*, 8 C.F.R. § 1003.1(b). Indeed, if she did more, the BIA would have deemed it redundant. *Matter of Coelho*, 20 I. & N. 464, 470-71 (BIA 1992) (BIA treats collateral motions that seek the same relief sought through direct appeal, "as part of the appeal.").

Buried in a footnote, and appropriately so, respondent meekly suggests that Ms. Circu could have or should have filed a motion to remand even though she had requested the relief in her appeal. Opposition at 11, fn. 9. However, a motion to remand was both an inappropriate and inadequate

remedy. First, motions to remand are not vehicles to challenge due process violations by the IJ, but, like motions to reopen are vehicles to present new evidence not available at the time of the removal proceedings. *See Matter of Coelho*, id. Ms. Circu was not seeking to proffer evidence unavailable at the time of the proceedings before the IJ. Instead she was seeking an opportunity to present evidence that would have been available at the time of the IJ's decision to rebut the 1999 *Country Report*. Ms. Circu thus employed the correct vehicle to allege a due process violation. *See Biwot*, id. Second, the BIA's authority to grant or deny motions to remand is discretionary, and by regulation, the BIA can "deny a motion to [remand] even if the party had made a prima facie case for relief." 8 C.F.R. § 3.2(a), *redesignated*, 8 C.F.R. § 1003.2(a); *see also Ramirez-Alejandre*, 319 F.3d 365, 374-75 (9th Cir. 2003). Consequently, this Court has determined that direct appeals, not collateral motions, are the appropriate means to challenge due process violations by the agency. *Castillo-Villagara v. INS*, 972 F.2d 1117, 1029-30 (9th Cir. 1992); *Gomez-Vigil v. INS*, 990 F.2d 1111, 1124-1125 (9th Cir. 1993)(Judge B. Fletcher concurring); *Sarria-Sibaja v. INS*, 990 F.2d 442, 444 (9th Cir. 1993).[4]

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[4] Respondent is correct that Ms. Circu is challenging a due process violation by the IJ as opposed to the BIA. However, this Court's

Respondent nevertheless pontificates that by appealing to the BIA Ms. Circu forewent an "opportunity" to rebut the 1999 *Country Report*, because the BIA at that time had the authority to conduct *de novo* review of the record, citing this Court's decision in *Ramirez-Alejandre*. Although it is true that the BIA did have the authority to review the proceedings before the IJ *de novo*, it is not true that Ms. Circu had available a procedural mechanism of supplementing the evidentiary record with evidence that was available at the time of the hearing. *See Ramirez-Alejandre*, id. at 374-76, 383-85 (Assuming even if appellants to the BIA had any means to supplement the administrative record it required that the evidence be new post-hearing evidence and comply with the other requirements of motion to reopen.) As this Court discussed in *Ramirez-Alejandre*, collateral motions deal with new evidence that was unavailable during the proceedings before the IJ. Furthermore, in *Ramirez-Alejandre*, this Court described the procedures regarding the consideration of post-removal hearing evidence, as opposed to

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precedent with respect to the lack of a need to file collateral motions applies with greater force in Ms. Circu's case because she did not have a regulatory mechanism such as a "motion to reopen" available to her; and she did put the issue before the BIA, thus affording it an opportunity to correct its error, but did not secure any relief or even ruling. This Court's precedent did not require the applicants in the cases cited to provide the BIA such an opportunity before establishing that the applicants had exhausted their administrative remedies. *See Castillo-Villagara*, 972 F.2d at 1029-30; *Gomez-Vigil*, 990 F.2d at1124-1125; *Sarria-Sibaja v. INS*, 990 F.2d at 444.

evidence available at the time of the IJ's decision, as "haphazard, irregular ... without any written regulation or procedure, and with the rules changing from case to case." *Ramirez-Alejandre*, id. at 374. If this Court was to allow the panel's decision to stand it would risk a tailspin into the same chaos that the Attorney General has labored to evolve beyond under new regulations. *Id.* at 374-76, 381-82 (Describing confused procedures before BIA, delay it caused in adjudications, and stating that "counsel for applicants were the marks in a game of Tegwar.")

In short, there is good reason why the panel and the government did not identify the mechanism that afforded Ms. Circu the opportunity to rebut the 1999 *Country Report*. None existed. The fact is that Ms. Circu did not fail to avail herself of an administrative remedy to rebut the 1999 *Country Report*. If there was an omission, it was by the BIA, when it failed to rule on an issue that was presented squarely before it, leaving Ms. Circu's due process challenge undecided by the agency. *See Sagadyak v, Gonzales*, 405 F.3d 1035, 1039-1040 (9th Cir. 2005)(Court concluding that when IJ does not decide an issue and BIA affirms without an opinion, agency failed to make a determination, and admonishing agency that "it goes without saying that IJs and the BIA are not free to ignore arguments raised by a petitioner.); *see also Movissian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005)(Same in

context of motion to reopen), *citing*, *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004).

B. RECENT PRECEDENT ESTABLISHES THAT THE PANEL EXCEEDED ITS AUTHORITY IN AFFIRMING THE AGENCY DECISION BASED ON WHAT THE PANEL THOUGHT THE IJ "SHOULD HAVE" FOUND, AND THE BIA IS PRESUMED TO HAVE FOUND.

Ms. Circu argues in her petition that the panel's affirming the agency decision based on what the IJ "should have" concluded but did not, exceeds entrenched proscriptions guiding judicial review of agency decisions, as well as *INS v. Ventura*, 537 U.S. 12 (2002), which held that the federal courts cannot usurp the authority of the agency to decide the issue of country conditions in the first instance. *See id.* As *Recinos De Leon v. Gonzales*, 400 F.3d 1185 (9th Cir. 2005), explained, cemented principles of judicial review instruct that, "We may affirm the IJ only on grounds set forth in the opinion under review." *Recinos De Leon*, id. at 1189.

Respondent attempts to circumvent the panel's patently overzealous exercise of judicial authority by shifting the attention to the BIA's affirmance without an opinion: "Accordingly, the panel decided the same claims as to the legality of the administrative notice, and its harmlessness, that the Board is *presumed* to have decided by streamlining the appeal." Opposition at 13 (emphasis supplied).

Recinos De Leon disallows such ballooning of an affirmance without an opinion. When the BIA affirms without opinion, it may be affirming the IJ's decision based on the reasons set forth by the IJ or reasons of its own, but as *Recinos De Leon* explained:

> The BIA, however, has not so informed us. Instead, the BIA directs us to review the IJ's opinion as the agency's explanation of its decision. Because it has done so, the BIA is "saddled with ...the risk of reversal on grounds that do not reflect the BIA's actual reasons," but do reflect the content of the IJ's opinion. *Falcon Carriche*, 350 F.3d at 855, *see also Albathi v. INS*, 318 F.3d 378 (1st Cir. 2003)([I]f the BIA does not independently state a correct ground for affirmance in a case in which the reasoning proffered by the IJ is faulty, the BIA risks reversal on appeal." (citing *SEC v. Chenery Corp (Chenery II)*, 332 U.S. 194, 196 67 S.Ct. 1575 (1947)).

Recinos De Leon, id. at 1189. As reflected by *Recinos De Leon's* citations, the circuit courts universally agree that when the BIA affirms without opinion, the soundness of the agency's decision rests on the reasons set forth by the IJ. *See, e.g., Morales-Morales v. Ashcroft*, 384 F.3d 418, 423 (7th Cir. 1984)("Streamlining has its institutional costs ...[T]he procedural short cut the Board took may have caused it to overlook the IJ's reliance on a defunct legal principle and of its own intervening decisions. We do not know that of course, because the thinking of the responsible BIA member is entirely opaque."); *Blanco De Belbruno v. Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004)("And the streamlined procedures in no way alter the degree of

scrutiny which this Court applies to asylum decisions. In cases of summary affirmance by the BIA, a reviewing court need only consider the reasons laid out by the Immigration Judge, not what the BIA may or may not have additionally meant in affirming the Immigration Judge's decision.")

Recinos De Leon makes clear that when the BIA affirms without opinion the decision of the IJ as it did here, the latter is the final agency decision. *Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1188-89 (9th Cir. 2005); see Certified Administrative Record ("CAR") 2; see also 8 C.F.R. § 3.1(a)(7), *redesignated*, § 1003.1(e)(4). In such instances the BIA is "saddled" by the IJ's reasons for its decision, even though its actual reasons for affirming the IJ's decision may be different. *Id.* As a consequence, in exercising judicial review, this Court does not reach beyond the four corners of the IJ's decision for a basis to affirm it. *See id.*

The *Circu* panel violates this rule. Respondent attempts to justify the panel's error by urging that the BIA's affirmance without opinion allows the Court to presume that the BIA sustained the IJ's decision on grounds other than those set forth by the IJ, and in turn allows this Court to affirm it on that presumed basis. Respondent's Opposition at 12-13. Long established precedent, embodied in *Recinos De Leon*, does not allow this Court to be so presumptuous. *See Recinos De Leon*, id. Respondent's explanation as to

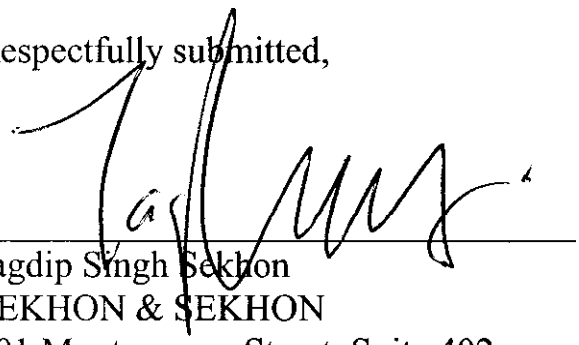
how the panel's decision did not violate *INS v. Ventura*, is thus unavailing. *INS v. Ventura*, 537 U.S. at 16-18(Circuit court cannot conduct de novo review to reach a determination vested with agency.)

CONCLUSION

For the reasons foregoing and those set forth in her petition for rehearing, petitioner Violeta Circu submits that rehearing *en banc* of the panel's decision in *Circu v. Ashcroft*, 389 F.3d 938 (9th Cir. 2004), is warranted.

DATED: June 17, 2005
San Francisco, Ca

Respectfully submitted,



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No. 02-73420

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIOLETA CIRCU,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF REHEARING

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1. As shown in Respondent's Opposition to Rehearing, Petitioner Violeta Circu ("Circu") seeks rehearing en banc of Circu v. Ashcroft, 389 F.3d 938 (9th Cir. 2004). She wrongly claims that the panel's decision is in conflict with circuit case law regarding administrative notice of facts. She also wrongly claims that the panel's conflicts with INS v Ventura, 537 U.S. 12 (2002), prohibiting the Court from deciding issues not decided by the agency. These claims are fact dependent, as are the cases Circu cites in her Supplemental Brief. Accordingly the Court

should have a short overview of the facts since they show how Circu's supplemental cases are inapposite and do not establish any circuit conflict with the panel's decision.

2. Circu applied for asylum and withholding of removal from Romania claiming past persecution on account of her Pentecostal religion and anti-Communist political views, by the former Communist regime that was overthrown in the late 1980's. The asylum hearing was in 1998. Circu put into evidence four State Department reports regarding conditions in Romania during and after the Communist regime. AR 58-64, 242-392. In 2000, the Immigration Judge ("IJ") issued a decision finding Circu was persecuted in the past by the former Communist regime, giving rise to a regulatory presumption of a well-founded fear of future persecution which the IJ found was rebutted by changed country conditions. AR 57-67. The IJ took notice of portions of a 1999 Department of State Report that was not part of the record of the asylum hearing. Id. The matters of which the IJ took notice were duplicates or virtually identical to matters already in the record in the other State Department reports. See Respondent's Opposition To Rehearing, pages 6-10.

Circu appealed to the Board of Immigration Appeals ("Board"). She disputed the IJ's administrative notice, contending that the 1999 Report supported

Circu's claim and also argued that country conditions were not changed. AR 23-33, 50-53. A single Board member affirmed the IJ's decision without a separate opinion pursuant to a streamlining regulation at 8 C.F.R. § 3.1(a)(7) (2002) (now codified at 8 C.F.R. § 1003.1(e)(4)). AR 2. The Board may issue this type of decision when a "Board member determines that the result reached in the decision under review as correct" and "any errors in the decision . . . were harmless or nonmaterial." Id.

A panel of this Court affirmed the denial of asylum and withholding of removal. The panel concluded that the IJ's administrative notice of the matters in the 1999 Report did not deprive Circu of due process, because she necessarily had notice since she appealed the IJ's decision to the Board, and she had an opportunity to respond in her appeal to the Board. The panel also concluded that any error on the IJ's part was harmless because there were no significant differences between the 1999 Report and a report already in the record. 389 F.3d at 941-43.

3. The cases cited in Circu's Supplemental Brief are inapposite and do not establish that the panel's decision is in conflict with the case law of this circuit.

a. Theagene v. Gonzales, __ F.3d __, 2005 WL 1398833, * 3 (9th Cir. 2005) is inapposite. Circu's assertion that this case "discusses the scope and

vitality" of two cases upon which she relied in her Rehearing Petition is misleading. See Pet. Supp. Br. at 2, citing Gonzalez v. INS, 82 F.3d 903 (9th Cir. 1996); Castillo-Villagra v. INS, 972 F.3d 1017 (9th Cir. 1992). Theagene holds that due process does not require an alien to be given notice and an opportunity to respond before the Board applies legal principles from an intervening en banc Board decision to an alien's case. Id. Theagene distinguishes and finds not controlling Gonzalez and Castillo-Villagra, which require an alien to have notice and opportunity to respond when the Board takes administrative notice of facts to dispose of a case on appeal. See 2005 WL 1398833, at * 3.

Neither Theagene, Gonzalez nor Castillo-Villagra pertain to the question decided by the panel in Circu's case – that is, whether an IJ's administrative notice of facts does not violate due process where an alien necessarily had notice, and an opportunity to respond by means of her appeal to the Board. There is no authority holding that due process is violated in such a situation.

b. The four due process cases cited in Circu's Supplemental Brief simply reiterate the rule that in order to establish a violation of due process an alien must prove prejudice. See Pet. Supp. Br. at 2. The cases are otherwise inapposite, because none pertains to the kind of due process issue in Circu's case regarding

administrative notice at the hearing level, with notice, and opportunity to respond at the appellate level. See Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1058-59 (9th Cir. 2005) (due process violation where IJ declined to hear relevant testimony because of prejudgment about witness credibility); Biwot v. Gonzales, 403 F.3d 1094, 1100-01 (9th Cir. 2005) (due process violation due to ineffective waiver of counsel and right to appeal); Mohammed v. Gonzales, 400 F.3d 785, 793-94 (9th Cir. 2005) (abuse of discretion in denying motion to reopen claiming due process violation because of ineffective assistance of counsel); Salgado-Diaz v. Ashcroft, 395 .3d 1158, 1164-65 (9th Cir. 2005) (due process violation in repeated denial of hearing on claim of unlawful arrest by border patrol and transporting alien across border).

c. Recinos De Leon v. Gonzales, 400 F.3d 1185 (9th Cir. 2005) is inapposite. See Pet. Supp. Br. at 2. In Recinos, the Board affirmed without opinion an IJ's decision that was "incoherent" and "impossible for [the Court] to decipher." Id. at 1189. The Court concluded that this made the"'agency's reasoning indiscernible'"and precluded the Court from "'exercis[ing] its] duty of review.'" Id., quoting SEC v Chenery Corp., 318 U.S. 80, 94 (1943). The Court remanded the case for a clear, coherent agency decision. Id. There is no claim in

Circu's case about the lack of clarity of the IJ's decision.

d. Sagaydak v. Gonzales, 405 F.3d 1035 (9th Cir. 2005) is also inapposite. See Pet. Supp. Br. at 3. In Sagaydak, the Board affirmed without opinion the decision of an IJ which did not decide a material question that had been raised before the IJ – namely, whether the alien showed extraordinary circumstances excusing his failure to file for asylum within one-year of arriving in this country. Id. at 1039-41. The Court concluded that "the IJ was apparently not even aware of this [extraordinary circumstances] exception." Id. at 1040-41. Since the IJ made no decision as to whether extraordinary circumstances excused the failure to timely apply for asylum, the Court remanded the case to the agency for a decision as to that issue. Id. at 1041. By contrast, in Circu's case there was a decision for the Court to review on the question of changed country conditions: the IJ's decision, which the panel reviewed and affirmed.

e. Finally Movisian v. Ashcroft, 395 F.3d 1095 (9th Cir. 2005) is inapposite and does not conflict with the panel's decision. See Pet. Supp. Br. at 3. In Movisian an alien appealed an IJ's denial of asylum to the Board. While the appeal was pending the alien filed a motion reopen and remand supported by additional evidence regarding the asylum claim. The Board affirmed the IJ's

decision without opinion, and in a footnote denied the motion to reopen and remand, without explanation. Id. at 1097. The Court held that the Board abused its discretion in denying the motion to reopen without explanation, because "where the B[oard] entertains a motion to reopen in the first instance, and then fails to provide specific and cogent reasons for its decision, we are left without a reasoned decision [on the motion] to review." Id. at 1098. Movisian has no bearing on Circu's case: unlike Movisian, Circu did not file a motion to reopen with the Board while her appeal was pending, and unlike Movisian there is no Board decision entertaining such a motion and denying it without explanation. [1]

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[1] Circu already raised a variation of this issue to the panel, which correctly distinguished Circu's case. See 383 F.3d at 941 n. 5;Respondent's Opposition To Rehearing, note 9, page 11.